No. 341.

Brf. of Atty. Gen. (Richards) for U

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

FREDERICH HORNINGHAUS AND HENRY W. CURTIS, appellants,
v.
THE UNITED STATES.
No. 341.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

This case comes into this court on the certificate for instructions from the circuit court of appeals for the second circuit. The facts set forth in the record are as follows:

The appellants imported certain merchandise, consisting of woven fabrics in the piece, composed of silk and

cotton, into New York, and entered the same for consumption on September 15, 1897. The merchandise was returned by the appraiser as manufactures of silk and cotton in the gum, silk under 20 per cent, and was properly classified by the collector for duty at 50 cents per pound under paragraph 387, Schedule L, of the tariff act of July 24, 1897 (30 Stat., p. 151).

On the last item of the invoice the appraiser made an addition of "0.09 franc per meter" to make market value, making the appraised value exceed the value thereof declared in the entry. The merchandise had been entered at the invoice value, and in the liquidation of the entry on November 8, 1897, the collector levied an additional duty of one per cent of the total appraised value for each one per cent that said appraised value exceeded the value declared on said item in the entry, under the provisions of section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, which requires such additional imposition in the case of an undervaluation of any merchandise "subject to an ad valorem duty or a duty based upon or regulated in any manner by the value thereof."

Paragraph 387 of the act of July 24, 1897, after providing for specific duties on woven fabrics in the piece, concludes with the proviso:

> But in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem.

The specific duties assessed by the collector were not less than fifty per centum ad valorem of the appraised

value. In view of this fact, the importers protested against the exaction of the additional duty, claiming the goods were not subject to an ad valorem duty or to a duty based upon or in any manner regulated by the value thereof, but, on the contrary, were subject only to specific duties.

The Board of General Appraisers (one general appraiser dissenting) overruled the protest and affirmed the decision of the collector, holding the goods were properly subject to the additional duty imposed. (For opinion, see Appendix.) The appellants applied to the circuit court for a review of the decision of the Board of General Appraisers, and the court affirmed the decision. From this action an appeal was taken to the circuit court of appeals for the Second circuit, which has requested instructions upon the following questions of law:

First. Under the provisions of paragraph 387 of the act of July 24, 1897, and section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, was the merchandise in suit subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof?

Second. Did the additional duty of 1 per centum of the total appraised value of said merchandise for each 1 per centum that such appraised value exceeded the value declared in the entry, as applied to the particular article in said invoice undervalued, as aforesaid, accrue according to the provisions of section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897?

PARAGRAPH 387, SCHEDULE L, ACT JULY 24, 1897.

Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound, and if dyed in the piece, sixty cents per pound; if containing more than twenty per centum and not more than thirty per centum in weight of silk, if in the gum, sixty-five cents per pound, and if dyed in the piece, eighty cents per pound; if containing more than thirty per centum and not more than forty-five per centum in weight of silk, if in the gum, ninety cents per pound, and if dyed in the piece, one dollar and ten cents per pound; if dyed in the thread or yarn and containing not more than thirty per centum in weight of silk, if black (except selvedges), seventy-five cents per pound, and if other than black, ninety cents per pound; if containing more than thirty and not more than forty-five per centum in weight of silk, if black (except selvedges), one dollar and ten cents per pound, and if other than black, one dollar and thirty cents per pound; if containing more than forty-five per centum in weight of silk, or if composed wholly of silk, if dyed in the thread or yarn and weighted in the dyeing so as to exceed the original weight of the raw silk, if black (except selvedges), one dollar and fifty cents per pound, and if other than black, two dollars and twenty-five cents per pound; if dyed in the thread or yarn, and the weight is not increased by dyeing beyond the original weight of the raw silk, three dollars per pound; if in the gum, two dollars and fifty cents

per pound; if boiled off, or dyed in the piece, or printed, three dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if in the gum, or if dyed in the thread or yarn, two and one-half dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if boiled off, three dollars per pound; if dyed or printed in the piece, three dollars and twenty-five cents per pound; if weighing not more than one-third of an ounce per square yard, four dollars and fifty cents per pound; *but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem.*

SECTION 7, ACT JUNE 10, 1890, AMENDED BY SECTION 32, ACT JULY 24, 1897.

SEC. 7. That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition to the entry to the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise

than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; *and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry,* but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. *Such additional duties shall not be construed to be penal and shall not be remitted,* nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: Provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient

evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: Provided, further, that all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a *pro forma* invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value.

ARGUMENT.

I.

Under the customs administrative act of June 10, 1890, all importations of merchandise must be accompanied with an invoice stating the cost or market value.

The third section provides that at or before the shipment of the merchandise the invoice shall be produced to the United States consul abroad, with a declaration indorsed thereon stating that, if the goods were purchased, it contains "the actual cost thereof," and if obtained in any other manner than by purchase, "the actual market value or wholesale price thereof at the time of the exportation in the principal markets of the country from whence exported."

The fourth section provides that no importation of any merchandise exceeding $100 in dutiable value shall be admitted to entry without the production of the invoice,

or, if impracticable to produce it, an affidavit accompanied by a statement showing the actual cost of the merchandise, if purchased, or, if obtained otherwise, the actual market value or wholesale price thereof, etc.

The fifth section prescribes the forms of the declarations to be filed with the collector when the merchandise is entered by invoice. Where the merchandise has been actually purchased, the importer is required to state, on oath, the cost; where obtained otherwise than by actual purchase, the actual market value or wholesale price at the time of exportation in the principal markets of the country from whence imported.

It is in view of these provisions requiring the importer, upon entering the merchandise, to state its actual cost or market value, that Congress enacted the seventh section, the construction of which is now before the court. This section, as it now stands, amended by section 32 of the act of July 24, 1897, provides that the importer, at the time he makes his entry, may make such addition to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such merchandise in the principal markets of the country from which imported; but no such addition shall be made to the invoiced value of any imported merchandise obtained otherwise than by actual purchase.

The collector within whose district any merchandise is entered, whether the same has been actually purchased, or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any

article of imported merchandise subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per cent of the total appraised value thereof for each one per cent that such appraised value exceeds the value declared in the entry. The additional duty shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per cent of the appraised value of such article or articles.

Such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from manifest clerical error, nor shall they be refunded in any case of exportation, or on any other account, nor shall they be subject to the benefit of drawback. The section further provides that if the appraised value of the merchandise shall exceed the value declared by more than fifty per centum, except when arising from manifest clerical error, the entry shall be held to be presumptively fraudulent, and the collector shall seize the merchandise and proceed to forfeit it by legal proceedings. Such forfeiture shall apply to the whole of the merchandise in any case or package containing the particular article undervalued.

The question before the court is whether an article subject primarily to a specific duty, but under the restriction and regulation that it shall not pay a less rate of

duty than fifty per cent ad valorem, is an article subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof, seeing that, in the particular instance under consideration, the specific duty under the classification made by the collector equaled or exceeded a duty of fifty per cent ad valorem. In other words, did the fact that the collector ultimately assessed only specific duties, take the article from the category of goods subject to a duty regulated in any manner by the value thereof.

In determining this question it is necessary to consider *at what time* does the imported article become "*subject to duty.*" Is it at the time of the importation, when the goods are entered at the port, or is it at the time of liquidation, when the collector classifies the goods and assesses the duty? If an article is only subject to duty when the duty is ascertained by the collector and assessed, then the court must find in favor of the contention of the appellants, for the only duties assessed in this case were specific duties. But I take it that the time when the imported article is subject to duty is the time when it is imported—when it enters the port.

It is settled law that the right of the Government to the duties accrues when the goods have arrived at the proper port of entry. (*Meredith* v. *U. S.*, 13 Pet., 486, 494; *U. S.* v. *Dodge*, Deady, 124; *U. S.* v. *Lyman*, 1 Mason, 482; *U. S.* v. *Lindsey*, 1 Gal., 365; *Waring* v. *The Mayor*, 8 Wall., 110, 120, and cases cited; *U. S.* v. *Cobb*, 11 Fed. Rep., 76, 79; *U. S.* v. *Boyd*, 24 Fed. Rep., 690; *McAndrew* v. *Robertson*, 29 Fed. Rep., 246.)

The invoice and declaration is required to be filed in view of a possible duty to be levied, not of an actual duty assessed. If the only possible duty is a specific duty, then the necessity for a true valuation by the importer does not exist. But if, under any contingency, the collector may be obliged to refer to the appraised value of the goods in order properly to classify them and assess and liquidate the duties under the statute, then a case exists where the goods are subject to a duty based upon or regulated in some manner by the value of the goods, and the necessity for a correct valuation by the importer exists.

The invoice value entered by the importer and the appraisement made by the Government are in view of something to be done, not of something which has been done. The thing to be done is the liquidation of the duties by the collector. If, in properly liquidating the duties, it is necessary for the collector to know the value of the goods—in other words, if the duties are not purely specific, but must be levied and assessed in view of the value of the goods—then you have a case where the goods are subject to a duty based upon or regulated in a certain manner by their value, and it is incumbent upon the importer to make a true valuation when he enters the goods. If he fail to do this, he omits at his peril a duty enjoined upon him by law, and he can not complain if he is made to suffer the consequences.

II.

It is contended by the importer that it is a great hardship to assess an additional duty on his goods, by way

of penalty for undervaluation, when in point of fact the duties assessed were not based upon the valuation but were purely specific. The statute was not framed, however, to meet each individual case, but to provide a general rule which would compel importers to deal honestly with the Government. I concede it seems hard in the case before the court to enforce the penalty, but if the case comes within the law, the hardship can work no exemption. The law vests no discretion in the collector.

If the appraised value of the article exceed the value declared in the entry, and the article is one subject to a duty based upon or regulated in any manner by the value thereof, the collector must levy and collect the additional duty of one per centum of the total appraised value of the article for each one per centum that such appraised value exceeds the value declared in the entry. In the case of *Passavant* v. *U. S.* (148 U. S., 214) the court, speaking by Mr. Justice Jackson, said (top page 221):

> The appraised value of the merchandise having been conclusively ascertained in the manner provided by law, and being found to exceed by more than ten per centum the value declared in the entry, the collector, as a matter of mere computation, under the direction and authority of section 7 of said act, properly levied and collected, in addition to the ad valorem duty imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeded the value declared in the entry.

The rule requiring the importer to make a true and honest entry of the cost or market value of the goods he

imports is a general one and is necessary for the effective enforcement of the customs laws. It is not left to the importer to say whether he will or will not declare the value of the goods, or whether, if he declares the value, he shall make a true or false statement. He has no right to assume the responsibility of determining whether he will or will not make a statement, or whether, if he makes a statement, the statement shall be true or false. The law requires him to make a true statement. If he does not make a true statement, he might just as well make no statement. A false statement is worse than no statement.

Even in the case of goods free of duty, neither the importer nor the consul abroad can assume this fact and omit the invoice which states the cost or market value of the goods. The consular invoice is required whether the goods are free or dutiable. In fact, whether the goods be free or dutiable can not be determined except by the collector when he comes to classify the goods and liquidate the duties. Up to this time, the law must be complied with as if the goods were dutiable. This is for the purpose of furnishing the customs officers with all the facts so they may rightfully determine whether the goods are free or dutiable, and if dutiable, the proper duties to be assessed.

In the case of *U. S.* v. *Mosby* (133 U. S., 273), this court, speaking by Mr. Justice Blatchford, says, page 289:

> It is entirely clear, that the question of determining whether goods to be shipped will, when imported into the United States, be free from duty, is a question which could not be left to the determination of a consul. It often involves intricate points

of fact and of law, and must be as wholly cognizable by the proper officers and tribunals of the United States, appointed for the purpose, as the question of the proper rate of duty on dutiable goods.

So with respect to the case before the court. The question whether a specific duty or an ad valorem duty should be or would be levied could not be determined in advance by the appellants. The goods were subject to a duty regulated by their value. A duty at least equivalent to an ad valorem duty of fifty per centum had to be levied. To determine whether such a duty was levied it would be necessary for the collector to be truthfully advised of the value of the goods. The importers could not take the position, "we know the value of these goods, we know that a specific duty levied upon them will result in the goods paying a duty equivalent to a rate of fifty per centum ad valorem on their value, and therefore it is immaterial whether we make a true entry of their value or not." Since the duty to be assessed by the collector was dependent on the value of the goods, since it had to result in a rate which would be the equivalent of a duty of fifty per centum ad valorem on the value of the goods, the law made it incumbent on the importers to make a true and honest statement of the value of the imported goods. The necessity of such a statement must have been apparent even to the importers.

Of course in this case, where specific duties were ultimately assessed, it is not clear how the importers were benefited by the undervaluation. But a habit of undervaluation, if not stopped by the Government, would result in rendering null and void the concluding clause

of paragraph 387, to wit: "but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem." This closing provision of paragraph 387 can be effectuated in no other way than by insisting upon a true invoice and a correct appraisement.

After all, it is not clear that the importers have any just ground of complaint. Much is said by their counsel about the difference of opinion as to values between the importer and the appraiser, and how hard it is to compel the importer to pay a penalty because of such a difference of opinion. I submit it is not because of an honest difference of opinion that the importer is compelled to pay the penalty. These additional duties, as stated by Mr. Justice Campbell, speaking for the court, in *Bartlett* v. *Kane* (16 How., 263, 274), and quoted with approval in *Passavant* v. *U. S.* (148 U. S., 228), "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." "They are," as Mr. Justice Jackson added in the latter case, "designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character."

The broad rule applicable to every valuation, which may ultimately affect the classification of goods and the liquidation of duties, is necessary to discourage undervaluation and prevent fraud. Of this rule the importers had ample notice. It is not a question of a mere difference

of opinion. Congress has provided ample and elaborate means of testing and correcting differences of opinion. The action of the local appraiser is not conclusive. There might be an honest difference of opinion between him and the importer. The importer may, however, if dissatisfied with the action of the local appraiser, demand a reappraisement before a general appraiser, and if the result of this does not suit him, he may appeal to the Board of General Appraisers, whose action is final. Two reappraisements are afforded the importer before a valuation is conclusively reached.

Why should the importer complain of the levying of the additional duty in the case before the court more than in a case where an ad valorem duty was actually assessed? Was it not just as easy for the importer to make a true and accurate entry of the value of the goods in the present case as in the supposed case? The importer will concede that in the supposed case, if an ad valorem duty had actually been levied, and there had been a difference between the appraised value and the declared value, he would have no reason to complain of the assessment of the additional duty because of his undervaluation. If he knew that a true valuation was demanded in the present instance, could he not have complied with the law just as easily as if the goods were subject only to an ad valorem duty? If these particular goods had been a little more valuable, if they had been worth more than $1 a pound, an ad valorem duty would have been levied upon them. Would it have been easier for the importer, if the goods had been worth more than

$1 a pound, to make a true statement of their value than if they were worth less than $1 a pound?

In short, it was just as easy in this case as in any case for the importer to make a true statement of the value of the goods. There were the same means provided by law for adjusting any differences of opinion and of affording the importer ample opportunity to secure a correct appraisement of his goods. Therefore, in levying the additional duty because of the undervaluation, there is no more hardship in this case than there would be if an actual ad valorem duty was imposed.

It is impossible to sustain the contention that there is unusual hardship in this case, except by insisting that the importer had a right to determine in advance whether a true statement was or was not necessary; to determine in advance whether the duties to be levied under paragraph 387 were to be specific or ad valorem; in other words, to substitute himself for the collector and on his own motion dispense with the law. He had no right to dispense with the law. He knew that the goods were subject to a duty regulated by their value. The duty was to be specific or ad valorem, according to the value of the goods, and therefore was a duty regulated by their value. Under these circumstances it was incumbent on him to make a true entry of the value of the goods. He did not do so. For his own purpose, he undervalued them. He did it at his peril, and he has no just ground to complain of the penalties which have inevitably followed.

III.

In the case of *Pings* v. *U. S.* (72 Fed. Rep., 260), the circuit court of appeals of the second circuit held that when the question whether goods are to pay a specific or an ad valorem duty depends on whether they exceed a certain value, an appraisement is essential, and, if the appraisement disclose that the goods have been undervalued more than ten per centum, they are subject to the penalty of an increased duty, although the excess over ten per centum on the invoice value is not sufficient to require an ad valorem instead of a specific duty.

For the convenience of the court I print as an appendix to my brief the full text of the decision in this case, the opinion being delivered by Judge Lacombe. Substantially the questions argued here were raised and decided in that case. In the Pings Case, the goods were gloves, subject to specific duties, with a concluding proviso "that none of the articles named in this paragraph shall pay a less rate of duty than fifty per centum ad valorem." It is true that, since the Pings Case, section 7 of the customs administrative act has been amended. At that time it read:

> If the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry.

The section now reads:

> If the appraised value of any article of imported merchandise subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof, shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum, etc.

The additional language "subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof," has been inserted in section 7, so as to qualify the article of imported merchandise, which is subject to an additional duty in case of undervaluation. This qualifying language, however, was, before the amendment of the seventh section, present in the nineteenth section, which defines "actual market value or wholesale price," and the court, in the Pings Case, read section 19 in connection with section 7, so that what the court really considered and construed was section 7 as modified by section 19. It considered that the merchandise referred to in section 7, which is subject to an additional duty in case of undervaluation, is the merchandise described in section 19—that is, merchandise "subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof." This appears clearly from a reading of the opinion of Judge Lacombe, wherein, after stating the case, the provisions of the paragraph under which the gloves were classified, and the pertinent provisions of section 7, he says:

> Section 19 of the same act provides for appraisement of value "whenever imported merchandise is

subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof."

Where duties are purely specific no appraisement is required, and none is made; but under the provisions of a paragraph such as 458, above quoted, where the value of the goods determines the question whether they are to pay a specific or ad valorem duty, appraisement is essential; and it is to be expected that the statute should require the importer himself to state the value of his goods fairly and truthfully, and to enforce that requirement by appropriate penalties.

IV.

The stress laid by counsel for the importer upon the "cruelty and injustice" of construing the law so as to authorize the imposition of the additional duty in the case before the court may excuse a reference to certain decisions bearing upon the weight which courts may give to the plea of "hardship."

In the case of *The Queen* v. *Justices of Lancashire* (11 A. E., 157) Judge Patterson said:

> I can not tell what consequences may result from the construction which we must put upon the statute, but if mischievous, they must be remedied by the legislature.

In the case of *Rhodes* v. *Smethurst* (4 Mees & W., 63) Lord Abinger said:

> A court of law ought not to be governed or influenced by any notions of hardship; cases may require legislative interference, but *judges can not* modify the rules of law.

The idea that the judges, in administering the written law, can mold and warp it according to their notions—not of what the legislator said, nor even of what he meant, but of what in their judgment he ought to have meant; in other words, according to their own ideas of policy, wisdom, or expediency—is so obviously untenable that it is quite apparent that it never could have taken rise, except at a time when the division lines between the great powers of government were but feebly drawn and their importance very feebly understood. In the present condition of our political system this practice can not be acted on with either propriety or safety. (*Sedgwick on Const. St. Law*, 264.)

Where the law is clear the courts construe it as they find it. (*Amy* v. *Watertown*, 22 Fed. Rep., 218; *Raiser* v. *William Tell*, 39 Pa. St., 144; *Palmer* v. *Thatcher*, 3 Q. B. D., 353; *Fisher* v. *Harndon*, 1 Paine, 61; *Lake Co.* v. *Rollins*, 130 U. S., 670.) In the construction of a statute the courts can only declare what it is, not what it ought to be. (*Beatty Ex.* v. *United States*, Dev. Rep., 243.)

Mr. Justice Field, delivering the opinion of this court in the case of *Hadden* v. *The Collector* (5 Wall., 107), said:

> What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons; it is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

In the case of *The United States* v. *The Trans-Missouri Freight Association* (166 U. S., 290) Mr. Justice Peckham, delivering the opinion of the court, said:

> The public policy of the Government is to be found in its statutes, and when they have not strictly spoken, then in the decisions of the courts, and the constant practice of the Government officials; but when the lawmaking power speaks upon a particular subject, upon which it has constitutional power to legislate, public policy in such a case is what the statute enacts.

In the case of *United States* v. *Goldenberg* (168 U. S., 95) Mr. Justice Brewer, delivering the opinion of the court, said:

> The primary and general rule of statutory construction is that the intention of the lawmaker is to be found in the language he has used; he is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. * * * No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for justifies any judicial addition to the language of the statute.

In the case of the *United States* v. *Geise* (83 Fed. Rep.), the court said:

> We see no reason why the court should be astute to find some excuse for holding that Congress did not intend to say what it has said in positive and unambiguous language.

Revenue statutes are not laws founded upon any public policy. (*United States* v. *Wigglesworth*, 2 Story, 369;

Rice v. *United States*, 53 Fed. Rep., 910.) All tax laws are a bald exercise of power, to be literally obeyed. There is nothing equitable about such enactments. They are strict law, to be enforced accordingly. Their object is to afford revenue to the Government. (*Taylor* v. *The United States*, 3 How., 197.) This court has declared that the Government has nothing in view in such laws but the security of its own revenue. (*United States* v. *60 Pipes of Brandy*, 10 Wheat., 421.) They do not fall within the rule that penal laws are to be enforced strictly in favor of those prosecuted under them. (*The United States* v. *25 Cases of Cloth*, Crabbe, 386; *United States* v. *28 Packages of Pins*, Gilp., 306.) The law under consideration is not a penal law. Section 7, as amended by section 32 of the act of 1897, expressly says that "such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided," etc.

V.

It is submitted that the questions certified should each be answered in the affirmative.

JOHN K. RICHARDS,
Solicitor-General.

JANUARY 9, 1899.

APPENDIX.

PINGS ET AL. v. UNITED STATES (72 FED. REP., 260).

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

This is an appeal from the decision of the circuit court, southern district of New York, reversing a decision of the Board of General Appraisers, which reversed a decision of the collector of the port of New York exacting a penal duty for undervaluation of certain kid gloves imported under the tariff act of 1890.

Stephen G. Clark, for appellants.

Henry C. Platt, for the United States.

Before Wallace, Lacombe, and Shipman, circuit judges.

Lacombe, Circuit Judge:

The rates of duty on gloves of the kind imported are prescribed in paragraph 458 of the act of October 1, 1890. It provides that:

> Gloves of all descriptions, composed wholly or in part of kid or other leather * * * shall pay duty at the rates fixed in connection with the following specified kinds thereof, fourteen inches in extreme length * * * being fixed as the standard, and one dozen pairs as the basis, namely: Ladies' and children's Schmaschen of said length or under, one dollar and seventy-five cents per dozen; ladies' and children's lamb of said length or under, two dollars and twenty-five cents per dozen; * * *

ladies' and children's suedes of said length or under, fifty per cent ad valorem; all other ladies' and children's leather gloves and all men's leather gloves of said length or under, fifty per cent ad valorem; all leather gloves over fourteen inches in length, fifty per cent ad valorem. [Here follow other provisions for additional specific duties on other named varieties.] *Provided*, That all gloves represented to be of a kind or grade below their actual kind or grade shall pay an additional duty of five dollars per dozen pairs: *Provided further*, That none of the articles named in this paragraph shall pay a less rate of duty than fifty per cent ad valorem.

The importations in question are "ladies' and children's Schmaschen gloves, under fourteen inches in length." As such, they were dutiable at $1.75 per dozen, unless their value exceeded $3.50 per dozen, in which case they would be dutiable at 50 per cent ad valorem. The appraiser advanced their value in excess of 10 per cent of the value declared in the entry, and the propriety of this advance is not questioned. The appraised value, however, is not in excess of $3.50 per dozen. The collector held the merchandise liable to the additional or penal duty prescribed by section 7 of the customs administrative act of June, 1890. The importer contends, and the board of general appraisers sustained his contention, that no penal duty should be exacted, because gloves of this kind and grade pay a specific duty, and because the advance, although in excess of 10 per cent, was not sufficient to require them to pay the ad valorem duty exacted by the last proviso of the paragraph above quoted.

Section 7 of the act of June 10, 1890, provides that the importer—

> Of any imported merchandise which has been actually purchased may * * * when he shall make and verify his written entry of such merchandise * * * make such addition in the entry to the cost or value given in the invoice * * * as in his opinion may raise the same to the actual market value of such merchandise; * * * and the collector * * * shall cause the actual market value * * * to be appraised; and, if the appraised value of any article of imported merchandise shall exceed by more than ten per cent the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per cent of the total appraised value for each one per cent that such appraised value exceeds the value declared in the invoice, etc.

Section 19 of the same act provides for appraisement of value "whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof."

Where duties are purely specific no appraisement is required, and none is made; but under the provisions of a paragraph such as 458, above quoted, where the value of the goods determines the question whether they are to pay specific or ad valorem duty, appraisement is essential; and it is to be expected that the statute should require the importer himself to state the value of his goods fairly and truthfully, and to enforce that requirement by appropriate penalties. We see no reason, therefore, for restricting the broad language of the statute, and

concur with the judge who heard the case in the circuit court, that "the statutes require that all imports be entered at fair value; and this provision for increasing duties for undervaluations of more than 10 per cent makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not."

The decision of the circuit court is affirmed.

OPINION OF BOARD OF GENERAL APPRAISERS.

(18746—G. A. 4059.)

Where certain silk and cotton goods, properly classified under paragraph 387 of the tariff act of 1897, are appraised at a value exceeding that declared in the entry, they are subject to the additional duty imposed by section 32 of said act (amendatory of section 7 of the act of June 10, 1890), although actually assessed only with duties purely specific. (Tichenor, general appraiser, dissenting.)

Pings v. *United States* (72 Fed. Rep., 260; s. c., 18 C. C. A. Rep., 557), followed.

Before the United States General Appraisers at New York, December 24, 1897.

In the matter of the protest, 26961f–10955, of Hoeninghaus & Curtis, against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain merchandise, imported per *La Gascogne*, and entered September 15, 1897.

Opinion by Somerville, General Appraiser.

The issue raised by the protest involves the construction of section 32 of the tariff act of July 24, 1897,

under the provisions of which the collector assessed certain so-called penal duties on the importation in question, consisting of goods composed of silk and cotton. These goods were assessed for duty at purely specific rates under paragraph 387 of said act, and no objection is raised as to the correctness of the classification or to the specific rates of duty assessed.

It appears that, in making an appraisement of the goods, the local appraiser made an addition of 0.09 franc per meter to the entered value in order to make market value, the appraised value of the merchandise being thus made to exceed the entered value by that much per meter. The collector thereupon, in the liquidation of the entry, assessed the additional duty prescribed by section 32 of said tariff act, which amended section 7 of the customs administrative act of June 10, 1890.

The importers claim that this additional duty was levied without authority of law, as the goods were assessed with and subject to only specific duties.

It is true the duties prescribed in said paragraph 387 generally are specific, and that in the case of this particular importation only specific and not ad valorem duties were assessed; but the following pertinent clause is added to said paragraph:

> But in no case shall any of the foregoing fabrics in this paragraph pay *a less rate of duty than fifty per centum ad valorem.*

The whole question is whether these goods are "subject to an ad valorem duty, *or to a duty based upon or regulated in any manner by the value thereof*," within the meaning of this phrase occurring in said section 32.

Whatever doubts we might otherwise entertain as to the construction of these provisions of the tariff act of 1897 must be set at rest by the decision of the circuit court of appeals (Second circuit) in the case of *Pings et al.* v. *United States* (72 Fed. Rep., 260; 18 C. C. A. Rep., 557).

Paragraph 458 of the tariff act of October 1, 1890, levied on leather gloves purely specific rates of duty, with the proviso (which is entirely analogous to that attached to said paragraph 387) that "none of the articles named in this paragraph shall pay a less rate of duty than fifty per cent ad valorem." The gloves there under consideration had been assessed only with specific duties. The court (per Lacombe, J.) in construing section 7, of the act of June 10, 1890, the one amended by said section 32 of the tariff act of 1897, and relating to additional or penal duties, used this language:

> Section 19 of the same act (of June 10, 1890) provides for appraisement of value "whenever imported merchandise is subject to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value thereof."
>
> Where duties are purely specific, no appraisement is required and none is made; but under the provisions of a paragraph such as 458, above quoted, where the value of the goods determines the question whether they are to pay a specific or ad valorem duty, appraisement is essential, and it is to be expected that the statute should require the importer himself to state the value of his goods fairly and truthfully, and to enforce that requirement by appropriate penalties. We see no reason, therefore, for restricting the broad language of the statute, and

concur with the judge who heard the case in the circuit court that "the statutes require that all imports be entered at fair value," and this provision for increasing duties for undervaluations of more than 10 per cent makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not.

Following the principle of that decision it is our judgment that the protest must be overruled and the collector's decision (imposing the additional duties in question) affirmed, which is ordered accordingly.

H. M. SOMERVILLE,
CHARLES H. HAM,
Board of Classification of United States General Appraisers.

DISSENTING OPINION BY TICHENOR, GENERAL APPRAISER.

I am persuaded that, if section 7 of the act of June 10, 1890, as considered by the court of appeals in the Pings & Pinner Case, had been the same as that now in force, and if the considerations of law, justice, and public policy, which have been brought to the attention of the board by the brief of counsel in this case had been presented to the court, the conclusion in that case would have been different. In this view, I must dissent from the conclusions reached by my colleagues in this case.

It is presumed that in framing the customs administrative act of June 10, 1890, the Congress had in mind the then existing tariff act of 1883, which did not contain any provision like that under which this case arose;

in other words, no provision to the effect that an article subject to a purely specific rate of duty per unit of quantity should not pay less than a certain rate ad valorem. That act provided in certain cases for mixed or compound rates where the duty was based upon or regulated by the value, such, for example, as the duty on cotton thread and yarn (paragraph 318), where the specific rate per pound was dependent upon the value; also on cotton cloths (paragraphs 320 and 321), which were subject to an ad valorem rate, if of certain specified values.

The question had frequently been raised whether the additional or so-called penal duty provided for in section 2900 of the Revised Statutes was limited to merchandise subject to a purely ad valorem rate of duty, or included merchandise subject to mixed or compound or specific rates of duty, and whether the provisions of law in relation to market and dutiable value were applicable to merchandise where the specific rates imposed were dependent upon the value. The Treasury Department had repeatedly held (and this view was concurred in by the Attorney-General) that the additional or penal duty referred to did not apply to merchandise which had been assessed at purely specific rates.

The particular purpose of section 19 of the act of June 10, 1890, was to define the market and dutiable value of imported merchandise, and the use of the words "or to a duty based upon or regulated in any manner by the value thereof" was obviously for the purpose of making clear what had been before doubtful and the subject of dispute. It is assumed that these words were

inserted in section 7 of the act by the amendment in section 32 of the act of July 24, 1897, for a like purpose. They necessarily imply that the additional or penal duty *is not applicable to merchandise subject to purely specific duty*, thus differing radically from the original section, considered by the court in the Pings & Pinner Case, where it was held that no distinction was made between merchandise subject to specific and ad valorem rates. This provision (section 32 of the present act) does not refer to the *rate*, nor to *classes of merchandise*, but to the *duty* found to be due upon appraisement upon individual articles or particular importations of merchandise.

The duty levied and assessed in this case was *purely specific*, to wit, 50 cents per pound. That rate being equal to or in excess of 50 per cent ad valorem, the condition upon which the ad valorem duty was contingent did not arise. Consequently, the merchandise did not become subject to a duty "based upon or regulated in any manner by the value thereof," any more than if paragraph 387, under which duty was assessed, had simply read:

> Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard, and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound.

As stated by Mr. Justice Campbell, speaking for the Supreme Court, in *Bartlett* v. *Kane* (16 How., 263, 274), such additional duties "are the compensation for a violated law, and are designed to operate as checks and

restraints upon fraud." There can certainly be no just purpose in imposing an additional, exemplary, or penal duty where, as in this case, no advantage is sought or secured, no evasion attempted or accomplished, and where the Government has not been deprived of any portion of its lawful duties, nor injured in any way.

It has been held by the Attorney-General and the Treasury Department that the additional duty in question is a penalty. (Treasury Synopsis, 15946.) Whether it is or not, it seems to me that this is a case where the rule of construction that all doubts should be resolved in favor of the citizen and against the Government is peculiarly applicable. (*United States* v. *Wigglesworth*, 2 Story, 369; *Net and Twine Company* v. *Worthington*, 141 U. S., 468, 474.) A payment has been exacted from the protestants, by a summary process, in excess of the duties regularly prescribed by law, and irrespective of good or bad faith on their part.

I am of the opinion that the protest in this case should be sustained.

GEO. C. TICHENOR,
General Appraiser.

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